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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
a Nevada Corporation,
Petitioner,

vs.

W. S. RANCH COMPANY,
a New Mexico Corporation,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ARGUMENT

In accordance with Rule 24(4) of the United States Supreme Court Rules, Rule 24(4), 28 U.S.C., Petitioner will reply only to those arguments first raised in the Brief in Opposition to the Petition for a Writ of Certiorari. No reply will thus be made to Points III or IV.

Respondent characterizes itself as a righteous landowner whose property has been invaded by Petitioner, as in the days of the Old West when might made right. By an excursion outside the record, Respondent asserts that Petitioner failed to negotiate with it prior to constructing the pipeline and well and speculates as to why no condemnation action was filed. Although we deem such matters to be irrelevant in determining whether certiorari should be granted, a response is invited and justified to place the matters in proper perspective.

The uncontroverted affidavit filed by Petitioner below reveals that the challenged pipeline and diversion well were constructed entirely within the right of way of the Atchison, Topeka & Santa Fe Railway Company and upon the lands acquired by the railroad through condemnation proceedings in the United States District Court for the District of New Mexico (Tr. 2, R. 13), and not upon land in which Respondent held a clear fee simple interest as it would have this Court infer. By reason of the disposition of the condemnation action, the Railway obtained a determinable fee in the lands involved herein, and Respondent was left with a mere possibility of reverter upon the railroad's abandonment of use of the land for railroad purposes. *Prince* v. *Charles Ilfeld Co.*, 72 N.M. 351, 383 P.2d 827 (1963).

Respondent's speculation as to why Petitioner did not negotiate with it or condemn the land is obviously misleading since Petitioner was under no duty or obligation to negotiate with Ranch. Furthermore, New Mexico law placed no burden upon Petitioner to institute prior condemnation proceedings since the inverse condemnation statute, Sec. 22-9-22, N.M.S.A. 1953, provides a plain and adequate remedy for the "landowner" in an action to be instituted

by it, and not by the proposed condemnor. Due to the efforts of the same attorneys representing Respondent here, the New Mexico Supreme Court has unequivocally ruled that inverse condemnation is the landowner's exclusive remedy and that a common law action is barred. *Zobel* v. *Public Service Company*, 75 N.M. 22, 399 P.2d 922 (1965).

POINT I

The Court of Appeals Has Decided a Vital State Constitutional Issue in a Manner Which Is or May Be in Conflict with Applicable State Law

An examination of the opinions of the District and Circuit Courts so clearly reveals that the question of state law is unsettled and difficult of resolution, and that the decision by the Tenth Circuit will have an adverse economic effect upon the State, that no further reply is necessary to Respondent's unsupported contentions to the contrary.

POINT II

The Decision of the Court of Appeals Is in Conflict with Applicable Decisions of This Court

Respondent's misinterpretation of the law governing abstention is amply demonstrated by its citation of *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959) in support of its position that abstention is completely a matter of discretion. While it is true that there are certain areas of discretion, that rule does not apply here where the decision by the federal court interferes with sovereign prerogative in the areas of conservation and development of water in an arid state, delegation of the power of eminent domain, and promotion and protection of economic development. In *Thibodaux*, this Court recognized that under certain circumstances it had:

> ". . . *required* District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." (Emphasis added)

Even if abstention here were wholly a matter of discretion, failure of the Tenth Circuit Court of Appeals to abstain under the circumstances of this case, constitutes a clear abuse of such discretion.

If it were not for the fact that *Thibodaux* and *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959), were decided on the same day, one might infer that Respondent contends that *Thibodaux* is no authority whatsoever and that it was effectively overruled by *Mashuda*. As a matter of fact, however, *Mashuda* involved no constitutional question, and the Court's decision was premised upon the express grounds that the State law was clear and settled and that the only question to be determined was a purely factual one of whether or not the land was taken for a private or public use. Any similarity between that case and the questions involved here is purely superficial. To say, as Respondent does, that:

> ". . . all that is involved is the availability of an easement by condemnation of another's land"

is a gross oversimplification.

POINT V

The Importance of the Question and the Departure in the Decision Below from Accepted and Usual Principles Governing the Resolution of Controversies in Our Federal System Call for an Exercise of This Court's Power of Supervision

Respondent asserts that abstention should be denied because of the possible delay involved, and because there

is a strong likelihood that the New Mexico Courts would refuse to decide the question even if abstention were ordered. What delay may occur if abstention is granted seems clearly to be overridden by the serious effects on a multitude of interests if abstention is denied. Refusal to abstain would seriously affect New Mexico's policies of conserving and distributing to beneficial uses its scarce water supply and promoting economic development to the benefit of all its citizens. When the entire economy of a state may be adversely, and perhaps unjustifiably, affected, abstention should not be denied because of delay and expense to one individual. This is not a case where the party requesting abstention is in possession of the property in the sense of *Thibodaux* or *Mashuda*. Nor is this a situation where delay would have a "chilling effect" on a basic constitutional guarantee such as freedom of speech; in fact, a refusal to abstain will have a "chilling effect" upon New Mexico's economic development. Respondent has not been ousted from his land by Petitioner; the pipelines, after all, are underneath the ground and are entirely upon property in which a third party has a fee interest.

The proposition that the State Court will refuse to entertain jurisdiction in the declaratory judgment action is equally untenable. The suit in Colfax County was brought under the New Mexico Declaratory Judgment Statute, Section 22-6-1, N.M.S.A. 1953, the provisions of which are substantially identical to the Federal Declaratory Judgment Act, 28 U.S.C., Section 2201. See *National Liberty Insurance Co. of America* v. *Silva*, 43 N.M. 283, 92 P.2d 161 (1939). While the New Mexico trial courts have discretion in entertaining jurisdiction in a declaratory judgment action, the State Supreme Court has held that jurisdiction should be entertained and exercised when the judgment will serve a useful purpose in clarifying and settling the

legal relations in issue and will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding. *National Liberty Insurance Co. of America* v. *Silva, supra;* see also *Maryland Casualty Company* v. *Pacific Coal and Oil Company,* 312 U.S. 270 (1941). That such criteria are present here cannot be seriously questioned. It is inconceivable that the state court would decline to exercise jurisdiction to decide such a crucial issue of state law where the federal court in which the action initially was pending has declined to exercise its jurisdiction to allow the state court to rule definitely on the question.

CONCLUSION

For the foregoing reasons, and those set forth in full in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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